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ABSTRACT

The rights of parents and children can best be understood, it is argued, if the law is seen as distributing power over children's lives. Three case studies that illustrate this thesis are discussed with reference to some changes to the law contained in the Community Welfare Bill 1981 (New South Wales). It is further argued that the legal principle that the child's welfare is the paramount consideration does not resolve legal disputes because litigants have different views of what constitutes the child's best interest. A list of some of the bases on which people claim power over children's lives is provided and its categories are discussed. Listed bases for claiming power over children are biological, associational, expertise, representative of the state, cultural identification, personal autonomy of children, and impartial arbitrator of other claims (the courts). It is concluded that attempts to enter propositions such as "children have a right to a secure home life" into law are dubious exercises that do not much advance the cause of law reform. Further, children's rights would be advanced if the law accorded the right weight to the various categories of claimants, and ensured that the various claims were properly examined before a decision was made in a particular case. (Author/RH)

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Selected Papers

Unit for Child Studies

Number 17

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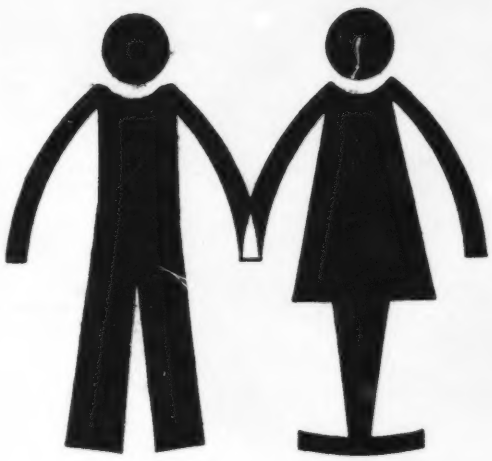

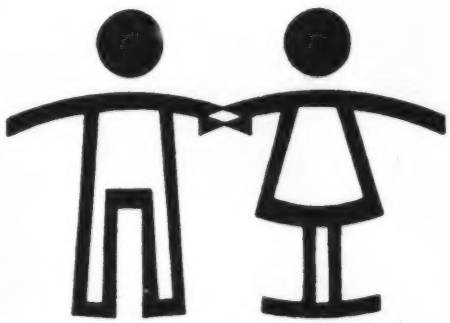

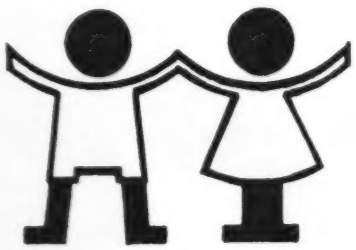

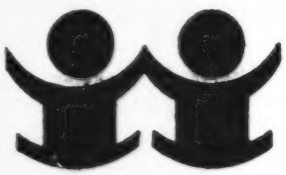

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RIGHTS OF PARENTS AND CHILDREN 2 RICHARD CHISOLM

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RIGHTS OF PARENTS AND CHILDREN

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(Transcript of a talk given at the Spring Saturday Seminars,
Unit for Child Studies, September 19th, 1981)

SYNOPSIS

The rights of parents and children can best be understood, it is argued, if the law is seen as distributing power over children's lives. The paper presents three case studies to illustrate this thesis, and considers them in the light of some changes to the law contained in the Community Welfare Bill 1981 (N.S.W.). It is suggested that children's rights are no easier to state, and no less influenced by political and social values, than adults' rights.

A. PARENTS AS GUARDIANS

Parents are the guardians of their children and jointly entitled to their custody. The precise meaning of "guardianship" and "custody" is a rather technical and elusive matter, but a very short account will be sufficient for present purposes. "Custody" means the right to control the child's life. It is mainly used when parents separate and cannot continue to look after the child together. An order for custody means that the child should live with one parent and that parent will in general make decisions about the child's life. Usually, the other parent will have visiting rights. Visiting rights are called "access". The most common order is that one parent have custody and the other parent have access.

When a court makes an order that parent A should have custody and parent B should have access, parent B remains a "guardian". However, guardianship without custody does not amount to very much in terms of control of the child's life.

Let us assume that parents remain together. What does it mean in practice to say that they are guardians and entitled to the child's custody? I think it boils down to this:

(i) The law *permits* the parents to do things even though they might otherwise be illegal. For example, the parents may inflict "moderate and reasonable" corporal punishment. They may also administer any money or property belonging to the child.

(ii) In some areas, the law *enforces* parents' wishes against the child. For example parents' consent is required for the marriage of a girl aged between sixteen and eighteen. In practice, however, the law is not often called upon to back up the parents' authority. Their authority stems from the facts: they command resources that the child needs, the child cannot readily find other accommodation, and the emotional bonds usually mean that such questions do not arise.

(iii) The law *requires* the parents to do some things for the child. The most obvious example is the obligation to send children of school age to school. Another is the maintenance of the child: under the Family Law Act parents are obliged to maintain the child, and in theory applications for maintenance can be taken against the parents by the child or some other person on the child's behalf. I say "in theory", because in practice maintenance proceedings are always taken by one parent against the other on the break up of the marriage. This common situation actually involves the first principle as well as the second. Assume the wife has the children and is seeking maintenance for them from the husband. The court can order the husband to pay so much for the children's maintenance (principle (iii), but it orders the money to be paid to the wife, and it is up to her to decide how to spend it - there is no way the law forces her to spend it on behalf of the children. This reflects the first principle, in which the law as it were trusts the parents to care for the child properly.

(iv) To a very limited extent, the law *enforces* parents' decisions about the child *against third parties*. An example is medical treatment. Where the child is under sixteen, parents' consent must be obtained for medical treatment, except in certain situations of emergency.

Up to at least the end of the nineteenth century, this was a key legal principle. Then, of course, it was not so much the parents as the father. He was the legal guardian of his legitimate children, and generally speaking the courts would enforce his wishes against anyone else. Today the parents are, in law, on an equal footing. But there has been a fundamental change. Almost all disputes about what happens to children are now governed by the rule that the child's welfare is "the paramount consideration". This means that if there is a dispute about what should happen to a child, the court will not enforce parents' wishes as such but will make up its own mind about what is good for the child. Anyone can go to court and ask for an order, and the court will treat it on its merits.

Let me give two examples of this. First, any of you could go to the Supreme Court and apply for custody of my children. You would lose, I hope. But the court would not say to you: "you have no right to come here about someone else's child". It would see what you had to say, and do whatever it thought best for the children. The second example is a real case.[1] It was decided in England in 1975, but the principles are exactly the same here. Parents of a handicapped child, a girl of eleven, decided after much thought and discussion to have her sterilized. They thought this was the best thing to do, for she suffered from a rare condition which involved accelerated physical development but mental impairment. However, an educational psychologist who was working with the girl thought that this was a terrible invasion of the girl's rights.

She applied to the court. The court held, on hearing all the evidence and argument, that the child's welfare would not be served by the sterilization. The judge thought that there was no obvious danger of her becoming pregnant, that contraception could be used, and that only in the most drastic circumstances would it be right to deprive a person of the physical ability to have children, especially as in the particular case the court found that the girl would be able to make an informed decision on the matter by the time she was eighteen. The court forbade the operation.

This case illustrates vividly how far the law has come. It is not really true that the law will enforce parents wishes against third parties. It is more accurate to say (a) that any matter relating to a child's life may be brought before a court and the court will decide the question on the basis of what it thinks is best for the child, but (b) where the parents appear to be looking after the child satisfactorily and appear to have made their decision in what they see as the child's interests, a strong case would have to be made to persuade the court to make some different determination. Judges, like most people, think that generally speaking it is best for parents to make decisions about their children.

This is a very brief account, and I have left out many important details in an attempt to clarify the main points. For example, there is doubt about the position of children born outside wedlock: their mother is a guardian, but it is not quite clear whether, as a result of recent legislation, the father has also become a guardian. Again, I have referred airily to "the court" without discussing which cases go to the Family Court of Australia and which cases go to various New South Wales Courts.

I want to proceed to discuss the notion of children's rights and parent's rights. It will be convenient to start with three case studies.

B. *THREE CASES*

Case 1 : Neyen's Case

Mr Neyens was an agricultural worker on a low income. He was married, but separated from his wife, and living with another woman. She bore him a child. However, when the child was only 8 months old, the relationship ended. The mother left. Mr. Neyens refused to let her take the child because he said that she had abused the child and he feared for the child's safety in her care. But Mr. Neyens could not look after the child himself; presumably he had no extended family to help him and no sufficient resources to enable him to arrange for alternative care, assuming that it was available. In these circumstances he approached the A.C.T. Department of Child Welfare for help. He said that he wanted temporary care of the child, since he expected soon to be re-united with his wife, and then she would be able to help him care for his son.

The departmental officer went with Mr. Neyens to the children's court, where in a short proceeding the child was found to be "neglected" because he was "destitute" and was made a ward of the State. Under an arrangement between the A.C.T. department and the N.S.W. department, young William Neyens was taken to a babies' home in N.S.W. and thereafter came under the control of the N.S.W. department of Child Welfare

(now Youth and Community Services).

Two months later, Mr. Neyens was, as he had hoped, reunited with his wife, and sought the child's return. But the department refused.

Their refusal was contained in a letter sent by the head of the department to Mr. Neyens. It was a remarkable letter. It informed the Neyens that "the natural father of an illegitimate child has no rights whatever regarding the custody or guardianship of the child, although he has the responsibility of paying maintenance for it (sic) until it reached the age of sixteen or is adopted or dies whichever is the sooner". The letter also referred to the child as "the only innocent person involved in the relationship between you and (the mother)". It concluded that no hope could be held out that Mr. Neyens would ever have his son back.

After unsuccessful appeals to members of parliament and further requests to the department, Mr. Neyens applied in the A.C.T. Supreme Court for custody. The Court heard his evidence and held that it was in the child's interests to be placed in his custody, and so ordered. The judge said that normally he would be reluctant to override a departmental decision, but in this case the decision seemed clearly wrong. The department did not really argue the "merits". It took the position that the provisions of the Child Welfare Act gave the Minister absolute power to make decisions about state wards, and therefore the Supreme Court had no jurisdiction. On this ground it appealed to the High Court. The High Court upheld the appeal. The law that emerges from the case is that the Supreme Court has no jurisdiction to hear custody applications relating to state wards; decisions relating to them are exclusively vested in the Minister. This is still the law in New South Wales and the A.C.T.

Several points need to be stressed about this case. First, nothing was ever said against Mr. Neyens as a father: all his actions were consistent with his being a caring father; indeed, his persistence in fighting a determined and less than courteous department all the way to the High Court shows considerable devotion to his son. Second, at the time Mr. Neyens sought to have his son back the child was in a babies' home, not with foster parents: there was no question of other bonds having been formed, or other people having become (in the current jargon) his "psychological parents". Third, the department did not really argue about the child's welfare in the Supreme Court or in the High Court, that the legislation gave the Minister the final say and that was the end of it. Because of this tactical position taken by the department, it is possible that there were other facts which may have justified the department's decision. However, this seems unlikely. In fact, the child was subsequently returned to Mr. Neyens. I gather from conversations with members of the department that what caused concern was the apparent instability of Mr. Neyen's marriage at the time. This was thought to justify the department in delaying the child's return. I find this argument hard to sustain, for two reasons. First, such a "wait and see" policy places children in a kind of limbo, not knowing who is really in a parenting role, and it seems now generally agreed that this should be avoided if at all possible. Such a limbo could clearly have been avoided for the Neyens child, since the father was now in a position to offer proper care. Only if that situation was demonstrably dangerous for the child would the refusal to return him have been justified. The second reason is that the department's letter did not inform Mr. Neyens of any such reason, and indeed it suggested that he would never get the child back: it said nothing about visits,

working towards a reuniting of the family, and so on. I would think that elementary notions of fairness would have required the department to tell Mr. Neyens the basis of their decision, and their plans for the future.

Case 2 : McGuire's Case [2]

You will probably be familiar with the case of Stephen McGuire, for it attracted vast attention from the media. Let me summarise the facts very briefly. The mother was an addict and a prostitute, and was unable to care for the child. Within a few months, Stephen was made a ward of the state and placed with foster parents, the McGuires. It appears from the judgments in the Court of Appeal that when the placement was made the departmental officers gave the McGuires to understand that the placement would be permanent. Stephen continued to live with the McGuires who proved entirely satisfactory foster parents. There was effectively no contact with the mother.

When Stephen was 3½ years old, the mother sought his return. She claimed that she had ceased to be an addict and a prostitute, that she was now married and able and willing to care for her son.

The contest, therefore, was between established foster parents and a biological mother. This is a very difficult type of case. On one hand is the view that children should in general grow up in the care of their parents. On the other is the view that when adults care for a young child for a significant period the child becomes bonded to them, they become the child's "psychological parents", and removal is likely to cause psychological harm as well as much distress to the child.

The matter was decided by the Supreme Court in favour of the McGuires, and the Court of Appeal upheld the decision. Essentially, the decision was based on two factors. First, evidence suggested that the mother may not be able to offer a stable and satisfactory environment for Stephen. Worries on this score were especially important because of the extra care and skill which would be required to care for him after such a long absence, and the trauma of the trial. Second was the argument about bonding and psychological parenthood. It is not at all clear how the case would have been decided had it not been for the first factor, that is, had it been a contest between an ideal biological parent who had been absent for three years and the foster parents.[3] The decision is not, therefore, a significant recognition of the importance of psychological parenthood over biological parenthood. The way the evidence turned out, the decision was, I think, not in much doubt, and the Court of Appeal had no trouble dismissing the appeal.

What is more important in the McGuire case is that the court was able to determine the matter at all. You will recall that the legal result of Neyen's case was that the Minister's decision was final. The reason the court could hear the McGuire case was that, as a result of great pressure from the media and from the Premier, the Minister relinquished his statutory guardianship to allow the court to hear the case.

Case 3 : FREDDIE'S case [4]

This was an adoption case, but also involved child welfare proceedings. Freddie was born 1974 to a full blood Aboriginal mother, Anupa, and a white father. Anupa brought Freddie up, apparently without any help from the father. On several occasions she brought the child to the Alice Springs hospital suffering from under-nutrition and "jitteriness": it appeared that at the time the mother was drinking to excess but cared for the child well when sober. On one occasion, when Freddie was about seven months old, he was discharged from hospital into the Welfare Receiving Home at Alice Springs. Then the welfare authorities made their move. On 8 May a welfare officer applied for a declaration that the child was "neglected"; the matter was for hearing the next day. The documents were served on the mother on 8 May. At that time she was in hospital with a broken leg, and the judgment states "There was no possibility of Anupa getting out of hospital to attend the hearing...Mrs. Lane, the welfare officer concerned, conceded in evidence that she knew Anupa was in hospital and had no way of attending the court".

As might be expected, the judge had something to say about this, perhaps less than he could have said:"... to give one day's notice only of a hearing with such important possible results seems to me quite inadequate and to give such notice to an illiterate full-blood Aboriginal woman knowing that even if she understood the notice she was physically unable to do anything about it seems to me to constitute a denial of justice of a particularly serious kind. No reason was given by Mrs. Lane for acting with such haste and I am unable to find one..."

The magistrate nevertheless proceeded to deal with the matter and duly made the child a state ward. (This decision should give pause to those who think that any form of judicial review is a safe protection for people's rights). Subsequently, Anupa tried unsuccessfully to discover where Freddie was. He was placed for adoption with a visiting American couple. Anupa refused to consent, and an application was made to the Supreme Court of the Northern Territory to "dispense with her consent" so that the adoption order could be made. At the time of the application, November 1976, Anupa was living in a tribal marriage with a full blood Aboriginal in Docker River, and there was evidence that this relationship and the extended family were stable. The American couple were "admirable people" conscious of the difficulties of mixed adoptions, and were proposing to take Freddie with them back to the United States. The court held that in these circumstances it was not satisfied that the adoption would promote Freddie's welfare, and the application was refused.

C. CHILDREN'S RIGHTS: THEORISING

I have already referred to the legal principle that the child's welfare is the paramount consideration. It might be thought that if this really is the law, that is all there is to it: what more could the law do to respect children's rights than say that their interests are paramount?

Such a view is untenable, I think, because the paramountcy principle does not address itself to the crucial question of *power*. It is in the form of a direction to a court or other decision-maker: treat the child's interests as paramount. But it doesn't tell us who gets to make the decisions. I think that the most important thing that children's law does is to distribute power to various people to make decisions about children's lives. Compare Neyen's case and Freddie's case. Each involved conflicts between adults about what should happen to a child. In *Neyens*, the welfare authorities thought it best for the child to remain away from his father, while the father disagreed. In *Freddie*, the welfare authorities and the intending adopters claimed that the child would be best with the intending adopters, while the mother claimed the child would be best with her. Assume all these people have the child's welfare at heart. The principle that the child's welfare should be paramount does not resolve the problem, because it doesn't tell us, among the various people with different views about what is best for the child, whose decision prevails. This depends on other rules. In *Neyens*, the rule was that the Minister's decision prevailed. In *Freddie*, it was that the Court's decision prevailed. In *McGuire*, although the Neyen's rule remained the law, the Minister waived his right to make the decision and so the Court made it. The key question, then is who gets to make the decision.

Of course, the Law is not the only thing that deals with the power to make decisions. All sorts of social and economic factors constrain and shape power. Take Mr. Neyens. There was no rule that said he had to give up his child. But because of his poverty, the lack of free child care and supporting parents' benefit, the obligations of his employment and values about the role of men in relation to children, he had no real alternative. Even if he had been the legal guardian of the child, his legal right would have been an empty shell, since he needed help, and the help offered by the department came at a price: we will help you if you give up your parental rights. This is why the child was made a state ward. In what follows I will deal with the legal framework of power, but it should not be forgotten that this is only one of the many contexts in which power is determined.

I think it is helpful to think in terms of the basis on which people claim power over children's lives. Here is a list of some of the most important claims:

1. *Biological*. Here the claimant says, in effect, "I should have certain rights to make decisions about this child because I am connected to the child by ties of blood". Such a claim is most obviously made by a father or mother. In another context, such a claim is made by adopted people who seek to discover their origins.

2. *Associational*. Here the claimant says, "I should have certain rights to make decisions about this child because of my association with him or her". This is the claim of the McGuires, competing with the biological claim of the mother.

3. *Expert*. Here the claimant says "Though I am unrelated to the child, and have no relevant associational links, I should have some say because of my expert knowledge". This is the basis, for example, on which a court will allow a child psychiatrist to express

an opinion on what is best for a child; the general rule of evidence is that witnesses should not express opinions, only state facts.

4. *Representative of the State.* Here, the claimant relies on some kind of official capacity. Obviously, police officers and departmental officers fall into this category, and the law gives them certain powers that other people don't have, such as the power to bring children before the children's courts. Often, this claim is combined with that of expertise. Adoption agencies are a good example. They have vast powers, and the basis of their claim is a combination of expertise and the fact that they are licensed or authorised to do the work. It is interesting that both the claim of expertise and that of public office gain strength from the apparent objectivity and disinterestedness of the claimant: the precise opposite of the associational claimant, whose intimate and committed personal involvement is at the heart of the claim. It is easy to see the political implications of competing claims between the expert public official and the involved non-expert such as a foster parent. Think, for example, of the writings of Ivan Ilich.[5]

5. *Cultural identification.* Here, the claimant says: "I share with this child a particular culture, and this ought to give me the right to make decisions". Such a claim is not recognised by legislation in this country. However, it was made very clearly at a recent seminar on the Community Welfare Bill called by Aboriginal organisations.[6] They argued forcefully that the law should recognise their claims to their children, and pointed to the existence of legislation in the United States protecting such rights in American Indians. Although not in the legislation, the claim of cultural identification was one of the bases of the decision in Freddie's case, and also seems to have been a factor in a leading custody decision in the Family Court of Australia.[7]

6. *Personal Autonomy.* This is the claim of the children themselves. The claim is that they should be able to determine, or influence, decisions about their own lives. The force of this claim depends to a large extent on the age of the children. Although some writers[8] have urged it in an absolute form for children of any age, it is at its most forceful in the case of older children. It has important implications. For example, it can be argued that the claim to personal autonomy requires the provision of information upon which the child can make the decisions. This is one argument, and a good one, for the inclusion of legal education in the school curricula. However, I have elected to focus in this paper on the allocations of power among adults over young children. I would not like it thought, however, that this claim cannot be made at all for young children. Anyone who has sat in on children's courts or been involved in the care of children, must be aware of the need to inform and involve even young children in the decision-making process. Young Stephen McGuire knew a great deal about his own custody case, and knew what he wanted. It is cruel, and surely bad for children, to subject them to changes of environment without fully discussing with them the reasons for and implications of the changes. It is often difficult for the law to enforce this. However, some progress has been made. It is possible even for tiny children to be represented in the Family Court of Australia, and the court can give such weight to the child's wishes in custody cases as seems proper in the light of the child's maturity and understanding of the case.

7. *Impartial arbiter of other claims.* I have used this awkward category because otherwise I would not be able to include a major body that exercises power over children, namely the courts. The court occupies a rather special position. It adjudicates between different claimants. It is not necessarily so; the law *could* say that in certain situations the claims of certain people prevail: indeed it did say this in Neyens case, where the claim of the state representative, the Minister, was not subject to the court's jurisdiction. Usually however, the competing claims are resolved not by such rules but by an evaluation of the strength of each claim in a particular case by the court.

D. *BACK TO THE CASE STUDIES : LEGAL DEVELOPMENTS.*

I invite you to reconsider the three case studies mentioned in the light of the above analysis. I do not propose to do this in detail. If the analysis is any good, interested readers will be able to think it through for themselves. Here I want to consider the impact of some recent developments on the case studies, to illustrate the directions in which the law seems to be moving. I will concentrate on the provisions of the *Community Welfare Bill* 1981 (N.S.W.), now before Parliament.

Neyen's Case.

The Bill will change the law substantially here. First, it is now crystal clear that the Department of Youth and Community Services can provide all kinds of supportive services, including I think short term residential care, without depriving parents of their status as guardians entitled to custody.[9] Of course the provision of such services will depend on government policy, but at least there is now no room for an argument (if there ever was) that the department would have to make the Neyens child a ward in order to provide services. Second, it is now provided [10] that the Supreme Court's jurisdiction continues after a child is made a state ward; under the Bill Mr. Neyens (and the McGuires and Mrs. Tull, and Anupa for that matter) could apply to the Supreme Court for custody, access, or other orders. Third, there is another method of challenging decisions relating to wards, namely a new body called the Community Welfare Appeals Tribunal.[11] Fourth, there is now a formalised system of case conferences to review the situation of a ward and advise the Minister.[12]

In terms of the analysis suggested here, the Bill will advance the claims of biological or associational claims, and also the claims of the court, at the expense of the claim of the state representative. Other developments also advance Mr. Neyen's claim. Legislation designed to remove the legal stigma of illegitimacy[13] may have the effect of making Mr. Neyens a legal guardian; and recent decisions of courts have shown a willingness to recognise the value of a child's relationship with an ex-nuptial father.[14]

McGuire's Case

Under the Bill, either the McGuires or the mother can go as of right to the Supreme Court. Of course, in practice, this will only be an effective change for many people if legal aid is available, as it was for both sides in the McGuire case.

Does this solve the problem? Only partially, I think. Stephen's problem was partly that he was one of the horde of children described in a famous English study[15] as "children who wait". In theory, foster care aims at reunion with the original family. In practice, it is often taken for granted that this will be impossible; we have seen that the court found that the McGuires were told that Stephen would be with them "for keeps". At no stage, even now, has it been settled who is going to be Stephen's parents in the emotional sense. The Bill does not solve this problem. But it contains an interesting provision in relation to children in non-government care. Under clause 84, where a child has been in a nongovernment childrens home for 12 months without substantial contact with the parents the court may, on application by an officer of the non-government home, make orders placing the child with foster parents or other appropriate orders.

Some people think that the problem of children who wait requires even more drastic measures. In *Before the Best Interests of the Child* (1980) Goldstein, Freud and Solnit present a detailed scheme under which long-term foster parents will have much greater rights to a secure relationship with the child. I find such proposals very difficult to evaluate. On one hand the need for these children for a secure home seems undeniable. On the other, such resolute measures are proposed in a community which makes it very difficult for many parents to care for their children: I am thinking of the limited availability of child care and the way the present government has allowed public support of poor families to fall behind inflation,[16] a problem greatly compounded by high unemployment. It seems clear that poverty is a major factor in many children's admission to children's homes and foster care.[17] The kind of measures proposed by Goldstein, Freud and Solnit are liable to bear very harshly on parents who love their children but have not the resources to look after them. It seems quite unfair for a society on one hand to organise itself in a way that makes it impossible for many parents to care properly for their children and on the other to move swiftly to cut off ties between those parents and their children when the parents, recognising their children's needs, arrange for them to be cared for elsewhere. Perhaps on a case-by-case basis, children's rights do require such measures, and we have to face the fact that the Australian community, by re-electing governments with such policies, is apparently willing to tolerate the consequent injustice.

Freddie's Case.

There is no way the law can stop departmental officers acting as they did in Freddie's case, or Neyen's case. All it can do is provide appropriate measures through which such actions can be challenged, and this the new Bill does. Freddie's case also raises acutely the political issues mentioned in the last paragraph, with the added element of the decades of oppression and degradation that the Aborigines have

suffered at the hands of white society. The new Bill does little to recognise the claim of Aboriginal people to their children. There is, to be sure, a provision designed to ensure that the children's court takes account of cultural or ethnic identification of the child, and "the desirability and feasibility of...placing the child in the custody of a person belonging to that ethnic group".[18] But such provisions do not much affect the balance of power, especially as it is often hard for Aborigines to present their cases in court, even if they are not in hospital with a broken leg.

A telling point was made at the Aboriginal seminar referred to earlier. That is, that many apparently neutral legal provisions operate in a discriminatory way. An example is the way the child welfare legislation deals with foster care. The legislation seems based on this policy: foster care by strangers carries a risk of incompetence and exploitation, and should therefore be licenced, but foster care by family members is sufficiently free of these dangers to be allowed to operate without approval. No doubt that policy is arguable, but it is not an unreasonable position. However, the relevant provisions[19] define foster care by "relatives" in a narrow way that makes sense for white family structures, but not for Aboriginal families. In the Aboriginal community, there is a much greater sense of the extended family, and a pattern of support of children that extends to people who would be regarded in the white community as "distant" relatives.[20] The result is that technically a foster care licence is required for the care of children by people who, in the Aboriginal community, are regarded as "family".

A key issue is whether the claim of cultural identification should prevail over other claims. I understand that in Victoria Molly Dyer has an organisation that in effect (with the consent of the courts and other authorities) makes determinations relating to Aboriginal children. Perhaps the time has come for the white community to provide the means for such Aboriginal organisations to be established throughout Australia, and to receive legal recognition.

CONCLUSIONS.

I have not offered a *definition* of parent's rights and children's rights; on the contrary, I have advanced a view that precludes a simple statement of them. There are such statements: some writers have formulated "bills of rights for children".[21] I have not found them very satisfying, because they do not seem to me to address the issues of power canvassed in this paper. If the above analysis is anything like correct, it is a dubious exercise to try to make the law state for example, that "children have a right to a secure home life", and other similar propositions. Such statements can perhaps be a useful formulation of value positions, but without more do not much advance the cause of law reform.

It seems to me that issues relating to children are no easier and no less politically loaded than issues relating to adults. It is quite naive, and perhaps dangerous, to think that if only everyone would sit down and think good thoughts they would simply see what is best for children and how the law should achieve it. In this paper I have not tried to advance a systematic program of law reform or say what rights parents and children should have. Instead, I have tried to

clarify the issues and choices confronting those who would make that attempt. I suppose I would say, as an empty formula, that children's rights and parents' rights would be advanced if the law accorded the right weight to the various categories of claimants, and ensured that the various claims were properly examined before a decision was made in a particular case. Such a statement can only be given content by adding one's political, social and economic values. That is something we each need to do before we can emerge with a workable idea of children's and parents' rights.

NOTES

1. *Re D* (1976) Fam. 185.

2. The decision has not yet been reported.

3. This point is stressed in the judgements.

4. Reported only in (1977) *Australian Child and Family Welfare* 2(6), 19.

5. Eg. *Tools for Conviviality.*

6. The Seminar was held in Sydney in August 1981. It passed the following resolutions:-

TASK FORCE FOR ABORIGINAL CHILDREN

At a seminar organised by The Task Force for Aboriginal Children on 7th August, 1981 to consider the New South Wales Community Welfare Bill and what it will mean for Aboriginal people, the following resolutions were passed, to be forwarded to the relevant ministers:

To the Minister for Youth & Community Services, and the New South Wales Attorney General:

RESOLUTION 1

> This seminar rejects The Community Welfare Bill, 1981, because it was developed without proper consultation with the Aboriginal community and fails to meet their demands and aspirations. The Bill further perpetuates a policy of assimilation and does not give Aboriginal people the right to decide the future of their children.

RESOLUTION 2

> This seminar supports the principle that Aboriginal children must be dealt with by their Aboriginal communities. This principle should be embodied in all laws covering Aboriginal children, as well as requiring both special laws similar to the United States Indian Child Welfare Act, 1978 and the provision of appropriate resources to Aboriginal communities.

To the Federal Minister for Social Security and the Minister for Aboriginal Affairs:

RESOLUTION 3

> In respect of the 1967 Referendum which gave powers to the

Federal Government to make laws for Aboriginal people, this seminar requests the Federal Government to immediately set up an Aboriginal Commission to obtain the views of Aboriginal communities throughout Australia on developing legislation on the precedent of the United States Indian Child Welfare Act, 1978. This request confirms Aboriginal demands that Aboriginal children should be dealt with by their own communities.

7. *Sanders* v *Sanders* (1976) Family Law Cases 90-078.

8. Eg. John Holt, *Escape from Childhood* (1974, Penguin)

9. Parts III and IV.

10. Clause 113.

11. Clauses 284-292.

12. Clauses 117-120.

13. Children (Equality of Status) Act 1977.

14. Eg. *Re CN & MG* (1976) *Australian Law Reports, 9, 666.*

15. J. Rowe & L. Lambert *Children Who Wait* (Assoc. of Brit. Adopt. Agencies, 1973).

16. See eg. Peter Saunders in R. Brown (ed) *Children Australia* (Geo. Allen & Unwin 1980) p 197.

17. See D. Hansen, *Why Are They in Children's Homes?* (Report of ACOSS Children's Home Intake Study, AGPS 1979).

18. Clause 81.

19. Child Welfare Act 1939, s 28; see also Community Welfare Bill 1981, Cl 44(2).

20. See D. Barwick, "The Aboriginal Family in South Australia" in J. Krupinski & A. Stoller, *The Family in Australia* (1978).

21. Eg. Foster & Freed, "A Bill of Rights for Children: (1972) *Family Law Journal*, 6, 343.

USEFUL REFERENCES

I have not over-burdened this paper with notes, as it draws on materials that are readily accessible. A valuable general treatment of Australian children's law is Helen Gamble, *The Law Relating to Parents and Children* (Law Book Co. 1981). I have written elsewhere on these matters: in A. Burns and J. Goodnow, *Children and Families in Australia* (Geo. Allen and Unwin 1979) and in R. Brown ed. *Children Australia* (Allen & Unwin 1981); "Understanding Custody Law" (1981) *Australian Journal of Sex, Marriage and Family*, 2, 87. Two English books, Brenda Hoggett's *Parents and Children* (1978) and John Eekelaar's *Family Law and Social Policy* (1978) are valuable sources of ideas and references.